

SERVED: February 11, 1992

NTSB Order No. EA-3488

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-9318

v.

MAX C. VICINENZO,

Respondent.

OPINION AND ORDER

Respondent, acting pro se, has appealed from the initial decision of Administrative Law Judge Jerrell R. Davis, issued orally at the conclusion of an evidentiary hearing held on September 22, 1989.¹ The law judge affirmed the Administrator's allegation that respondent violated sections 91.95(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) when, on June 3, 1987, respondent operated

¹An excerpt from the transcript containing the initial decision is attached.

an aircraft within a restricted area.² The law judge also upheld the 30-day suspension of respondent's airman certificate, as imposed by the Administrator. It is respondent's position that the order of suspension is unjustified. He maintains that his entry into the restricted airspace was not careless within the meaning of section 91.9.

After careful review, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. We adopt as our own the findings of the law judge.

The order of suspension, which served as the complaint in the instant case, states:

- "1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 549448357.
2. On June 3, 1987, ... you, as pilot-in-command, operated Civil Aircraft N43753, a Piper Model PA-28, in the vicinity of China Lake, California.
3. On the occasion referred to herein, you operated N43753 within Restricted Airspace R-2505.
4. You did not have permission from the controlling or using agency of the above mentioned restricted area for your operation.

²FAR sections 91.95(a) and 91.9 read in pertinent part:

"91.95 Restricted and prohibited areas.

(a) No person may operate an aircraft within a restricted area ... contrary to the restrictions imposed, or within a prohibited area, unless that person has the permission of the using or controlling agency, as appropriate."

"91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

5. Your operation was careless so as to endanger the life or property of another."

Respondent does not dispute that, on June 3, 1987, he operated an aircraft in restricted airspace over China Lake Naval Air Station, California during a flight from San Martin, California to Las Vegas, Nevada.³ Nevertheless, he contends that the severe turbulence he encountered caused him to stray off course into the restricted area. The Administrator, however, presented evidence to show that respondent did not simply nick the corner of the restricted airspace, but instead flew through the middle of the area. Further testimony revealed that an air intercept controller at China Lake Naval Air Station tracked an unidentified aircraft on the date of the incident. The controller tried to establish radio contact, but received no response.⁴ He then instructed a nearby military aircraft to "run an intercept" on the intruder. The registration number recorded from the intruding aircraft is identical to the registration number on respondent's aircraft.

³Originally, respondent admitted to the statement in paragraph 1 of the complaint (that he was the holder of a private pilot certificate), but denied the other allegations of the Administrator. At the hearing, however, he admitted that he had flown into the restricted airspace, but maintained that he did so after experiencing severe turbulence.

⁴The incident report introduced into evidence at the hearing stated that military operations in progress at the time of the intrusion had to be suspended until the intruder was "no longer a factor."

Based on the evidence adduced at the hearing, we believe the law judge reasonably concluded that respondent operated his aircraft within restricted airspace without permission. He found that respondent's version of the facts was "too inconclusive to be sufficiently convincing." Since the law judge was in the best position to evaluate the demeanor of the witnesses as they testified, his credibility assessments, absent a showing that they were arbitrary or inherently incredible, are entitled to our deference.⁵ See Administrator v. Jones, 3 NTSB 3649, 3651 (1981). We also conclude that no clear and compelling reasons were presented to warrant a reduction in sanction. See Administrator v. Muzquiz, 2 NTSB 1474 (1975).

⁵Additionally, respondent claims that since the law judge was not a pilot himself, he was not sufficiently knowledgeable to decide this case. Respondent also asserts that he was "repeatedly interrupted" by the law judge during the hearing and thereby deprived of an opportunity to explain his conduct. These arguments are without merit and require no discussion. The record plainly illustrates that respondent had ample opportunity to be heard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.⁶

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).